Office-Supreme Court, U.S.
FILED
NOV 19 1962
JOHN F. DAVIS, CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 603

RENE BARDY,
Appellant,

vs.

UNITED STATES OF AMERICA
and MCA INC.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

JURISDICTIONAL STATEMENT

MORTON R. GALANE,
130 South Fourth Street
Las Vegas, Nevada

F. L. MORSBACH, Inc., [illegible] Oak Street, Kansas City 6, Mo., HArrison 1-2000

INDEX

Jurisdictional Statement	1
Opinion Below	2
Jurisdiction	2
Question Presented	3
Statutes Involved	3
Statement of the Case	5
The Federal Question Presented Is Substantial	9
Conclusion	11
Appendix A, Order Denying Motions for Leave to Intervene, and to Strike Affidavit	A1

Table of Citations

CASES—

Allen Calculators v. *National Cash Register Co.*, 322 U.S. 137	A2
Formulabs, Inc., v. *Hartley Pen Co.*, (1960) 275 F.2d 52	10, A1
International Mortgage & Investment Corp. v. *Von Clemon*, (1962) 301 F.2d 857	10
Sam Fox Publishing Company v. *United States*, 366 U.S. 19, 6 L. ed. 2d 604, 81 S. Ct. 1309	3, A1
Sutphen Estates, Inc., v. *United States*, 342 U.S. 19, 96 L. ed. 19, 72 S. Ct. 14	3, 9, A1
United States v. *California Cooperative Canneries*, 279 U.S. 553	A1
United States v. *The United Shoe Machinery Co.*, (D. Mass. 1953) 110 F. Supp. 295, 348	10

STATUTES, RULES—

Rule 24(a) (2) and (3), Federal Rules of Civil Procedure A1
Rule 24(a) (3), Federal Rules of Civil Procedure 2, 3, 4, 6, 9, 10
Rule 24(b) (2), Federal Rules of Civil Procedure A1
Rules 13(2) and 15, Supreme Court of the United States 1
Section 1 of the Uniform Fraudulent Conveyance Act, Vol. 9B, Uniform Laws Annotated, page 55 10
Sherman Act, Section 1, July 2, 1890, Chapter 647, Sec. 1, 26 Stat. 208, 15 U.S. Code, Sec. 1 4, 5
Sherman Act, Section 2, July 2, 1890, Chapter 647, Sec. 2, 26 Stat. 209, 15 U.S. Code, Sec. 2 4, 5
Sherman Act, Section 4, July 2, 1890, Chapter 647, Section 4, 26 Stat. 209, 15 U.S. Code, Sec. 4 4-5
15 U.S.C., Sec. 29 2, 11
15 U.S.C.A., § 79 k 10

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No.

RENE BARDY,
Appellant,

vs.

UNITED STATES OF AMERICA
and MCA INC.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

JURISDICTIONAL STATEMENT

The appellant, pursuant to the United States Supreme Court Rules 13(2) and 15, files this his statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the order denying motion for leave to intervene of the United States District Court, Southern District of California, Central Division, in question and that substantial Federal questions are presented.

Opinion Below

The United States District Court, Southern District of California, Central Division, delivered a written opinion, not officially reported, which denied a motion for leave to intervene by appellant. A copy of this opinion and the order denying the motion to intervene are included in Appendix A.

Jurisdiction

The appeal herein is from an order denying appellant's motion for leave to intervene made and entered by the United States District Court, Southern District of California, Southern Division, in a civil antitrust proceeding, wherein the United States of America was plaintiff and MCA Inc., a corporation organized and existing under the laws of the State of Delaware, was defendant.

The Order appealed from was made and entered on September 6, 1962. Notice of appeal was filed in the United States District Court, Southern District of California, Central Division, on September 27, 1962.

The Supreme Court of the United States has jurisdiction to review by direct appeal the Order complained of by the provisions of 15 U.S.C., Sec. 29, which states as follows:

> "In every civil action brought in any district court of the United States under any of said Acts, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court."

The said statute sustains the jurisdiction of the Supreme Court of the United States to review the order denying appellant's motion to intervene as of right pursuant to Rule 24(a)(3), Federal Rules of Civil Procedure.

in a proceeding in which the United States of America is plaintiff. *Sutphen Estates, Inc.*, v. *United States*, 342 U.S. 19, 96 L. ed. 19, 72 S. Ct. 14; *Sam Fox Publishing Company* v. *United States*, 366 U.S. 19, 6 L. ed. 2d 604, 81 S. Ct. 1309.

In *Sam Fox Publishing Co. v. United States, supra*, the Supreme Court of the United States postponed consideration of the question of jurisdiction until the hearing of the case on the merits. 364 U.S. 801, 5 L. ed. 2d 37, 81 S. Ct. 368.

Question Presented

Whether a person with a pending action against a wholly-owned subsidiary is entitled to Rule 24(a)(3), Federal Rules of Civil Procedure, intervention in a United States civil antitrust action against the parent corporation to protect by intervention that person's interest to the assets of the subsidiary, when the express purpose of the United States civil antitrust action against the parent corporation was to terminate the operation of and dissolve the subsidiary in order to dissipate the restraint in violation of the antitrust laws allegedly effectuated by the parent corporation's control and domination of the subsidiary and ten days after the antitrust action was commenced an order was entered upon stipulation between the United States and the parent corporation, which in force and effect terminated further operation of the subsidiary and disposed of its going concern assets?

Statutes Involved

In this case, appellant, Rene Bardy, claims that he was denied the right of intervention pursuant to Rule 24(a)(3), Federal Rules of Civil Procedure, which reads as follows:

"(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: * * * (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof."

The antitrust proceeding in which appellant applied for intervention pursuant to Rule 24(a) (3), Federal Rules of Civil Procedure, was governed by the following statutes:

Sherman Act, Section 1, July 2, 1890, Chapter 647, Sec. 1, 26 Stat. 208, 15 U.S. Code, Sec. 1:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal

Sherman Act, Section 2, July 2, 1890, Chapter 647, Sec. 2, 26 Stat. 209, 15 U.S. Code, Sec. 2:

"Section 2. Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the Court."

Sherman Act, Section 4, July 2, 1890, Chapter 647, Section 4, 26 Stat. 209, 15 U. S. Code, Sec. 4:

"The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1-7 of this title; and it shall be the duty of the several district attorneys of the United

States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises."

Statement of the Case

The appellant, Rene Bardy, filed a motion to intervene in a civil antitrust proceeding to protect his rights to assets of MCA Artists, Ltd., a wholly-owned subsidiary of MCA Inc.

The United States filed the antitrust action against MCA Inc. on July 13, 1962. The complaint alleged *inter alia*, that MCA Inc. has conspired to monopolize, and has attempted to monopolize, the talent agency business in violation of Sections 1 and 2 of the Sherman Act. The plaintiff prayed that said conspiracy and attempt be adjudged in violation of the Sherman Act, and that the restraints thus effectuated be remedied by dissolution of the defendant's subsidiary, MCA Artists, Ltd., and by cancellation of the talent representation contracts and package representation contracts held by said subsidiary, MCA Artists, Ltd. The complaint further alleged that MCA Artists, Ltd., was a talent agency engaged in the representation of talent and of their respective production companies in all fields of the entertainment industry and that it also represents or sells television programs to networks, sponsors and advertising agencies.

A temporary restraining order was entered on July 13, 1962, wherein it was recited that MCA Inc. was about to consummate divestiture of its talent agency business on or before July 18, 1962 and which restrained MCA Inc. from divesting and from taking any further action to consummate the proposed divestiture by MCA Inc. of any of the stock, properties or assets of any of its talent agency subsidiaries or affiliates.

A subsequent motion by MCA Inc. to vacate and dissolve said temporary restraining order was denied on July 17, 1962.

On July 23, 1962, ten days after the antitrust action was commenced, an order was entered upon stipulation between the United States of America and the parent corporation, MCA Inc., which in force and effect terminated further operation of the talent agency of MCA Artists, Ltd. by termination of all talent representation and package agency contracts with any client in the entertainment industry and prohibition against re-engaging in or having any financial interest in the talent agency business. Said order added: "Nothing herein shall impair the rights, if any, or obligations of third parties."

On August 20, 1962, the appellant, Rene Bardy, filed a motion to intervene in said civil antitrust proceeding, based in part upon the assertion of rights under Rule 24(a)(2) Federal Rules of Civil Procedure.

Appellant, Rene Bardy, was plaintiff in two separate actions against MCA Artists, Ltd., pending before the United States District Court for the District of Nevada, both of which actions had been consolidated. Said actions had been filed in March, 1961. On March 10, 1962, the Court had limited the time for discovery by all parties to June 10, 1962. MCA Artists, Ltd. had petitioned the court

for additional time for discovery; the request was denied by Order dated May 22, 1962.

In his motion to intervene, to which was annexed a proposed intervenor's claim, appellant, Rene Bardy, alleged that the termination of the valuable talent representation contracts by MCA Artists, Ltd., the wholly-owned subsidiary of MCA Inc., was made without consideration, except the consideration received by MCA Inc. in the defense of said antitrust action; that this jeopardized the position of appellant in his actions against MCA Artists, Ltd., the wholly owned subsidiary of MCA Inc.; that the force and effect of the termination of the valuable talent representation contracts and the resulting loss of future commissions would hinder and delay Rene Bardy in the collection of any judgment he would obtain in his actions in the United States District Court for the District of Nevada; that appellant's claim as intervenor had neither the purpose nor effect of impairing the full and absolute control by the United States of America over the prosecution and settlement of said antitrust action; that no extraneous issues would encumber the orderly prosecution of the antitrust ac[illegible] since appellant was merely attempting to secure adequate protection from the liquidation of the remaining assets of MCA Artists, Ltd., beyond the reach of appellant and thereby make such assets available for the collection of any judgment appellant may recover in the actions then pending in the United States District Court for the District of Nevada. The intervenor's claim prayed that MCA Artists, Ltd., should be required to retain sufficient assets to satisfy any judgment obtained by Rene Bardy or that MCA Artists, Ltd. or MCA Inc. should be required to post sufficient bond to protect Rene Bardy in the event he is successful in his actions against MCA Artists, Ltd., the wholly-owned subsidiary of MCA Inc.

The United States of America filed a memorandum in opposition to appellant's motion to intervene.

MCA Inc. filed a statement in opposition to appellant's motion to intervene, supported by an affidavit, which recited *inter alia* the following:

(1) MCA Artists, Ltd., has very substantial sums payable to it by its former clients for past services rendered; (2) there have been no steps taken, and no present intention to take any steps to dissolve or liquidate MCA Artists, Ltd.; (3) if such were to take place, the dissolution or liquidation would have to take place under Delaware law, which in conformance with general corporate law, requires the rights of creditors to be protected; (4) MCA Artists, Ltd., has and will have ample assets to cover any possible recovery by Rene Bardy; (5) MCA Inc., the parent corporation, is a responsible company which is actively engaged in business and the stock of which is listed on the New York Stock Exchange and is able to respond to any judgment which Rene Bardy might recover in his pending Nevada litigation "to the extent it might be responsible therefor"; (6) MCA has insurance coverage with respect to the causes of action raised by Rene Bardy in the Nevada litigation and the insurance carrier for the company is handling the defense of the action "under a reservation of rights".

Appellant, Rene Bardy, filed a motion to strike the affidavit filed by MCA Inc. in opposition to appellant's motion to intervene upon the grounds that (1) The allegations of intervenor's claim and the motion to intervene should be accepted as true for the purpose of ruling on the motion to intervene and therefore said affidavit which contained conclusions relevant to the intervenor's claim was argumentative and incompetent as a basis for op-

position to the motion, and (2) the affidavit contained legally incompetent conclusions unsupported by facts, including but not limited to the specific six statements to which reference is made hereinabove.

An order was made and entered on September 6, 1962, denying appellant's motion for leave to intervene and denying appellant's motion to strike the MCA Inc. affidavit.

The Federal Question Presented Is Substantial

The question presented by this appeal is so substantial as to require plenary consideration, with briefs on the merits and oral argument, for its resolution for the following reasons:

1. The scope of Rule 24(a) (3), Federal Rules of Civil Procedure, should be determined in the light of those standards heretofore prescribed by the United States Supreme Court in *Sutphen Estates, Inc., v. United States*, 342 U.S. 19, 22, 96 L. ed. 19, 72 S. Ct. 14.

2. The definition of "interest" sufficient to entitle a person to intervention pursuant to Rule 24(a) (3), Federal Rules of Civil Procedure, should be determined, where an order that was entered upon stipulation in a United States government civil antitrust proceeding in force and effect deprived the applicant for intervention of an opportunity to impress a lien upon the assets of a wholly-owned subsidiary of the antitrust defendant, because the assets of said subsidiary were disposed of by the stipulation of the antitrust defendant without consideration, except the consideration received by the parent corporation in the defense of the antitrust action.

3. The nature of the judicial process of shaping an order upon consent of the parties to a federal antitrust

proceeding should be formulated with respect to consideration of the practical economic rights of claimants and creditors. See *United States* v. *The United Shoe Machinery Co.*, D. Mass. 1953, 110 F. Supp. 295, 348.

4. The nature of the judicial process of shaping an order upon consent of the parties to a federal antitrust proceeding should be formulated with respect to the lack of control over the disposition of assets pursuant to the order as compared with the type of control exercised by federal courts in proceedings under the Federal Bankruptcy Act, the Chapter X reorganization statute and the Public Utility Holding Company Act, 15 U.S.C.A. § 79 k.

5. The status of a person applying for intervention as a claimant in a federal antitrust proceeding should be clarified, where in effect the applicant for intervention has been relegated to a position inferior to that of a "creditor" within the purview of Section 1 of the Uniform Fraudulent Conveyance Act, Vol. 9B, Uniform Laws Annotated, page 55, and an order has been entered upon consent of the parties to the federal antitrust proceeding which disposes of assets of a wholly-owned subsidiary of the antitrust defendant without consideration, except the consideration received by the parent corporation in the defense of the antitrust action.

6. The determination of the scope of Rule 24(a)(3), Federal Rules of Civil Procedure, has been the subject of recent decisions of the Court of Appeals of the Second Circuit, *International Mortgage & Investment Corp.* v. *Von Clemon*, (1962) 301 F.2d 857, and the Court of Appeals of the Ninth Circuit, *Formulabs Inc.* v. *Hartley Pen Co.*, (1960) 275 F.2d 52, and is an important Federal question for the United States Supreme Court.

Conclusion

Therefore, it is respectfully submitted that this Court has jurisdiction of this appeal under 15 U.S.C., Sec. 29, and that a Federal question is presented which is substantial and of public importance.

Respectfully submitted,

MORTON R. GALANE
130 South Fourth Street
Las Vegas, Nevada

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. MCA, INC., Defendant.	Civil No. 62-942-WM

Order Denying Motions for Leave to Intervene, and to Strike Affidavit

(Filed September 6, 1962.)

This cause having come before the Court for hearing upon (1) the motion of Rene Bardy, filed August 20, 1962, for leave to intervene as a claimant, pursuant to Rule 24(a)(2) and (3) and Rule 24(b)(2) of the Federal Rules of Civil Procedure, and (2) the motion of Rene Bardy, filed August 29, 1962, to strike the affidavit of Allen B. Susman, filed August 24, 1962, in opposition to the motion to intervene; and the motions having been submitted for determination pursuant to Local Rule 3(c); and it appearing to the Court that there is no ground either for intervention of right pursuant to Rule 24(a) of the Federal Rules of Civil Procedure (see *San Fox Publishing Co.* v. *United States*, 366 U.S. 683 (1961); *Sutphen Estates, Inc.*, v. *United States*, 342 U.S. 19 (1951); *United States* v. *California Co-operative Canneries*, 279 U.S. 553 (1929); cf. *Formulabs, Inc.*, v. *Hartley Pen Co.*, 275 F.2d 52 (9th Cir.), cert. denied 363 U.S. 830 (1960)), or for permissive intervention pursuant to Rule 24(b) of the Federal Rules of Civil Pro-

cedure [see *Allen Calculators* v. *National Cash Register Co.*, 322 U.S. 137 (1944)];

IT IS ORDERED that the motions of Rene Bardy for leave to intervene, and to strike the affidavit of Allen B. Susman, are hereby denied.

IT IS FURTHER ORDERED that the Clerk this day serve copies of this order by United States mail upon the parties appearing in this cause.

September 6, 1962.

Wm. C. Mathes
United States District Judge